



United States  
General Accounting Office  
Washington, D.C. 20548

Office of the General Counsel

B-250884

March 18, 1993

The Honorable Michael Rhode, Jr.  
The Secretary of the  
Panama Canal Commission

Dear Mr. Rhode:

This responds to your letter of October 8, 1992, asking, in your capacity as certifying officer for the Panama Canal Commission that we relieve you from liability in the amount of \$3,902.09 resulting from improper payments. For the reasons stated below, we grant relief.

BACKGROUND

The Commission is funded through a revolving fund that is available to carry out authorized Commission purposes, functions, and powers including official receptions and representations expenses of the Supervisory Board of the Commission, the Secretary of the Commission, and the Administrator of the Commission. 22 U.S.C. § 3712(a)(1)(C). However, no funds may be obligated or expended in any fiscal year for administrative expenses except to the extent or in such amounts as are provided in appropriations Acts. 22 U.S.C. § 3712(c)(2). Appropriations acts made available not to exceed \$4,000 in fiscal year 1991, and not to exceed \$5,000 in fiscal year 1992, for the official reception and representation expenses of the Secretary. Pub. L. No. 101-515, title II, § 104 Stat. 2177 (1990) and Pub. L. No. 102-143, title II, § 105 Stat. 938 (1991).

You charged the official reception and representation account during fiscal year 1991 and through July of fiscal year 1992 for a number of lunches and dinners attended by

766574/087645

government or former government officials.<sup>1</sup> On three occasions you were accompanied by your wife.

You advise that during the meetings with other high ranking government officials, matters of significant interest to the Commission were discussed, including legislative proposals affecting the Commission or the current or future operation of the Canal. You also advise that you met with former government officials at their request as a courtesy to bring them up to date on Commission activities. You state that you made the charges in good faith relying upon guidance contained in the Commission's Financial Systems Manual.

The Inspector General of the Commission audited the official reception and representation account expenditures for fiscal year 1991 and, after consulting with the Commission's General Counsel, reported that:

(1) the FSM guidance appeared to authorize the use of reception and representation funds by Commission employees to feed themselves as part of the normal day-to-day performance of their jobs;

(2) charges for routine business luncheons of government officials is not authorized, citing B-223678, June 5, 1989;

(3) the Secretary's charges in the amount of \$2,655.17 during fiscal year 1991 were for routine business meetings;

(4) the charges in question were not valid expenditures of appropriated funds; and,

(5) the Secretary's liability as certifying officer to repay the amount of any improper charge is automatic upon determination that the expenditure was not a legal obligation, regardless of whether his actions were in good faith and in

---

<sup>1</sup>The list provided to this Office identifies 38 separate events during fiscal year 1991 and 19 separate events through July 10, 1992. Of the two year total of 57 events, 23 were with a Member of the Congress or congressional staff, 12 were with State Department officials, 12 were with Department of Defense officials, 7 with former Commission officials, 1 with an OMB official, 1 with a White House official, and 1 with a former congressional staffer.

accordance with Commission's procedures and guidelines.<sup>2</sup>

Thereafter, you requested relief from liability for the \$2,655.17 cost of luncheons and dinners charged to the official reception and representation account in fiscal year 1991. You also requested relief in the amount of \$1,246.92 for the same class of charges made through July of fiscal year 1992 when you discontinued making such charges to the account after it became apparent from a preliminary draft of the IG's Report that a reasonable doubt existed as to the propriety of the charges.

#### Authorized Use of Reception and Representation Funds

The decision cited by the IG Report, B-223678, June 5, 1989, held that funds appropriated to the Office of the United States Trade Representative for official reception and representation were not available to pay for (1) light refreshments (coffee and donuts) at occasional meetings held before normal working hours involving officials from other government agencies and (2) similar refreshments provided to members of the U.S. delegation (including officials from other agencies), who meet separately during breaks in negotiations with foreign governments that extend beyond normal working hours.

Our decision makes clear that we will not object to an agency's use of its official reception and representation funds to cover expenses incurred in connection with official agency events, typically characterized by mixed ceremonial, social and/or business purposes, and hosted in a formal sense by high level agency officials. Further, while the phrases "official reception" and "official representation" are undefined in the law, any definition must reflect a distinction between the kinds of social and quasi-social functions that fall within the meaning of the phrase "official reception" and interagency working sessions or routine business meetings that do not. Thus we concluded that:

Viewing the factual situations posed by the USTR as interagency business meetings, we think such situations are covered by the long-established general rule prohibiting the use of appropriated funds to furnish or pay for food or meals to civilian employees at their official duty station

---

<sup>2</sup>Inspector General, Panama Canal Commission, Audit of Official Reception and Representation Accounts, Audit Report No. 490 (September 18, 1992).

even where unusual working conditions are involved. B-223678, June 5, 1989.<sup>3</sup>

From the record before us, it appears that at least some of the luncheons and dinners questioned by the IG were nothing more than interagency working meetings. The mere fact that a gathering was held in a restaurant does not automatically make it a social or quasi-social function chargeable to the official reception and representation funds. This is only one of the factors that will be considered in making this determination. The only question before this Office is whether to grant relief under 31 U.S.C. §3528 for the improper payments.<sup>4</sup>

#### Standard for Relief

Under 31 U.S.C. §3528(a), a certifying official is liable for improper payments. The Comptroller General is authorized to relieve a certifying official of liability under the provisions of 31 U.S.C. §3528(b) (1) if:

- (B) (i) the obligation was incurred in good faith;
- (ii) no law specifically prohibited the payment; and,
- (iii) the United States Government received value for the payment.

The requirements of (B) (ii) and (iii) for granting relief are clearly satisfied. We have long recognized that the (B) (ii) requirement is satisfied when there is no statutory provision that specifically prohibits the payments of the character involved. 70 Comp. Gen. 723, 726 (1991); B-191900, July 21, 1978. There is no statute specifically prohibiting payments for refreshments or meals served at interagency working meetings. The prohibition is a result of decisions by the accounting officers of the government

---

<sup>3</sup>On the other hand we held that the reception and representation funds were available to provide similar refreshments to the foreign delegations during negotiations that extend beyond normal working hours.

<sup>4</sup>The facts and circumstances of the various payments questioned by the IG as they relate to applying the standards for relief discussed in the rest of this decision are indistinguishable. Accordingly, we need not decide whether each and every payment questioned by the IG was in fact improper.

that appropriated funds are not generally available to pay for meals for government employees at their duty stations.

We have also recognized that the (B) (iii) requirement may be satisfied by receiving an intangible benefit, such as achieving the desired result. B-191900, July 21, 1978; B-127160, Apr. 3, 1961. Such an intangible benefit may be the communication among various government officials, or government officials and private persons, on matters relating to the Commission's conduct of its duties or functions.

A more complicated question is whether the certifying official acted in good faith as that term is used in the statute. There is no simple formula for determining good faith. However, an important factor in evaluating good faith for purposes of 31 U.S.C. § 3528 is whether the certifying officer had, or reasonably should have had, doubt regarding the propriety of the payment and, if so, what he or she did about it. Whether the certifying officer reasonably should have been in doubt depends on a weighing of all surrounding facts and circumstances and cannot be resolved by any "hard and fast rule." In many cases, good faith is found simply by the absence of any evidence to the contrary. 70 Comp. Gen. 723, 726 (1991).

At one time, the failure to obtain an advance decision from the Comptroller General on matters considered doubtful, was viewed as an impediment to establishing good faith. E.g. 14 Comp. Gen. 578, 583 (1935). However, it has become increasingly recognized that consulting agency counsel is a relevant factor in demonstrating good faith under 31 U.S.C. § 3528(b) (2). B-191900, July 21, 1978; B-127160, Apr. 3, 1961. In the present case you did not rely upon direct advice from agency counsel, but you did rely on Commission guidelines providing guidance on the use of representation funds. The guidelines were promulgated by the Commission's Chief Financial Officer with the assistance of the General Counsel and approved by the Administrator.<sup>5</sup>

The Panama Canal Commission Financial Systems Manual, § 14.900 (October 29, 1990), sets forth fund control procedures to follow when obligating funds under Congressional limitation. FSM 14.900, Exhibit 1, provides guidelines for administering Congressional spending limitations on reception and representation type expenses. FSM 14.900, Exhibit 1, states that:

---

<sup>5</sup>The Secretary serves in Washington, while the Administrator, the General Counsel and the Chief Financial Officer all serve in Panama.

### 3. OFFICE OF THE SECRETARY-OFFICIAL RECEPTION AND REPRESENTATION

Use of [official reception and representation] funds allows the Commission to promote a spirit of cooperation with visiting Panamanian dignitaries and with Congressional officials in Washington, D.C.; to promote the Commission's business relationship with principal users of the Canal and to accommodate special guests of the Administrator, the Board of Directors, the Secretary and other senior management members of the Commission. Costs will generally include: material, supplies and services incurred for official reception, representation and entertainment. Participation in such activities must be related to the management and operation of the Canal, the functioning of the Panama Canal Commission and the governments of the U.S. and the Republic of Panama.

#### a. Specific Inclusions:

(1) Costs of refreshments, meals, luncheons, dinners for: Members of Congress and their Staffs; official visitors and special guests of the Commission; diplomatic groups; government officials of the U.S. and Republic of Panama; military guests; members of the Board, their wives or guests, Canal users, and their representatives . . . . ;

(4) Cost of working meals and refreshments served in an office environment in support of the Supervisory Board or preparing for Congressional hearings.

In the absence of our June 5, 1989 decision, someone reading the October 29, 1990 revision to the guidance could reasonably conclude that the charges under consideration here were within FSM guidelines for authorizing payments. In this regard you stated that you were unaware of our 1989 decision upon which the IG relied to question the charges. The General Counsel for the Commission apparently was convinced of this fact since in his comments on the draft IG Report he concluded that you acted in good faith in reliance on the Commission's regulations and assisted you in drafting the request for relief.

Furthermore, following the issuance of the IG's Report, the Commission on November 16, 1992 revised the FSM to delete subparagraph (4) of paragraph "3.a. Specific Inclusions"

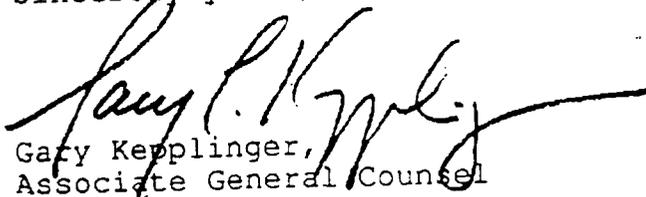
quoted above, and provided additional clarification for spending Official Reception and Representation funds. The first sentence of paragraph "3. OFFICE OF THE SECRETARY-OFFICIAL RECEPTION AND REPRESENTATION" was amended to limit the use of official reception and representation funds to "events characterized by a mixed ceremonial, social and/or business purpose, and hosted in a formal sense by high level agency officials." In addition the following subparagraph was added to paragraph "3.b. Specific Exclusions":

Cost of refreshments, meals, luncheons, or dinners for Commission employees or other U.S. Government employees at intra-agency or interagency work sessions or routine business meetings incident to the normal day-to-day performance of their jobs.

These changes are consistent with the holding in B-223678, June 5, 1989.

In view of the foregoing, we concluded you acted in good faith in reliance upon agency regulations, and therefore grant relief.

Sincerely yours,

  
Gary Kepplinger,  
Associate General Counsel